

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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CONTINENTAL & COMMERCIAL TRUST AND  
SAVINGS BANK, as Trustee,

Appellee,

vs.

PACIFIC COAST PIPE COMPANY, a Corporation,  
Appellant,  
and

KINGS HILL IRRIGATION & POWER COMPANY  
et al.,

Defendants.

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SUPPLEMENTAL BRIEF OF APPELLANT,  
PACIFIC COAST PIPE COMPANY.

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Upon Appeal from the United States District Court for  
the District of Idaho, Southern Division.

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N. M. RUICK,  
Solicitor for Appellant, Pacific Coast Pipe Company.

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F. D. Monckton,  
Clerk.



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**Supplemental Brief of Appellant, Pacific Coast Pipe  
Company.**

The appellee in its brief has challenged the right of the appellant to a prior lien upon the property, and asks this court to sustain the judgment of the lower court in this case upon the ground that the lien of the mortgage is prior to that of the mechanic's lien, even if the court shall find that the lower court was in error in its holding that the mechanic's lien had expired by limitation.

**CANAL CONSTRUCTED ON PUBLIC LANDS  
AND CAME INTO BEING BURDENED  
WITH LIEN OF CROSS-COMPLAINANT.**

It is alleged by the Pipe Company, and denied by the plaintiff and the several defendants, that the ditch or canal was constructed over public lands of the United States.

These works were being constructed pursuant to the provisions of what is known as the Carey Act, (Sec. 4, Act of Aug. 18, 1894, 28 Stats. 372-422), for the purpose of reclaiming certain desert lands of the United States upon the application made to the State of Idaho by the Glenns Ferry Land & Irrigation Company, the predecessor of the Kings Hill Irrigation & Power Company. The State of Idaho had applied to the United States and had procured the segregation of these lands.

The lands thus segregated are described in plaintiff's, Pacific Coast Pipe Company, Exhibit No. 3 (in Suit No. 351), [Tr., p. 371 Ex. "G"], denominatd "Articles of Agreement between E. H. Hitchcock, Secretary of the Interior, on behalf of the United States, and John T. Morrison, Governor, on behalf of the State of Idaho." It is on and over these lands thus segregated that the canals, laterals and other works constituting the irrigation system were constructed.

It is plain from the language of the Carey Act, as well as the agreement entered into between the State and the United States, that these lands continue to be lands of the United States until the same shall have been fully reclaimed, and any and all parties claiming any right, title or interest in and to these lands take the same subject to the requirements of the Act of Congress and the term of the contract referred to, and the State must "show full compliance therewith before it shall have any claim against the United States for a patent to said lands."

Under the Carey Act and the terms of this agree-

ment, the State becomes merely a trustee for the United States, the purpose of which trust is to procure the reclamation and settlement of these lands, and only when a compliance with all the requirements shall have been established does any title pass from the United States to the State or to the settlers upon the tract. It is not a present grant but a grant to take effect in the future upon a compliance with the conditions of the law and agreement. Therefore, these lands on and over which these works were constructed continued to be lands of the United States, and no right, title or interest therein or thereto, nor any right of way on or over the same, could be acquired except by a completion of the works.

Bear Lake Irrigation Co. v. Garland, 164 U. S. 1.

But the Trust Company and the defendants, in order to avoid the force of this statement, backed by the Garland case, alleged that they acquired a right of way from the State of Idaho. In reply to this, we say that, if the title to the lands remained in the United States, it is clear that the State of Idaho could not grant any rights or privileges with respect thereto. To do so would be for the State to interfere with the "primal disposal of the soil," prohibited by the Federal Constitution. But, assuming, for the sake of argument, that the State of Idaho had some interest in these lands by reason of the same having been segregated and set apart for the purpose of being reclaimed under the auspices of the State, we say that no right of way was ever granted by the State of Idaho, and that the Irrigation Company acquired no right of way, nor any

right, title or interest in these lands by reason of any agreement made by the State.

**EVEN AS STATE LANDS RIGHT OF WAY THEREON ONLY ATTACHES UPON COMPLETION OF CANALS AND SUBJECT TO MATERIALMEN'S LIEN.**

Treating these lands as State lands, or as lands in which the State has an interest, the Revised Codes of Idaho, section 1635, provide the only method by which a right of way for canals, reservoirs, etc., over State lands can be acquired, and there is no proof nor pretence that this method was pursued by the Irrigation Company in this instance.

Neither does the agreement between the State of Idaho and the Kings Hill Irrigation & Power Company bear out the claim made.

Paragraph 3 of the agreement between the State and the Irrigation Company, of date May 1, 1908 (Cross-complaint P. C. P. Co., Exhibit 1), [Tr., p. 340, par. 111], provides as follows:

“The said party of the first part grants to the said party of the second part a right of way across all lands *belonging to the State of Idaho or that may be ceded* to the State of Idaho by virtue of the Act of Congress commonly known as the Carey Act or by any other laws for the construction and operation of said reservoir and irrigation system.”

But these were not lands “belonging to the State of Idaho” nor lands “ceded to the State by virtue of the Act of Congress commonly known as the Carey Act.” It is clear that the State made no at-

tempt by this contract to convey a right of way over lands to which it had no title. It simply agreed that, so far as the State was concerned, in anticipation of the ultimate ceding of these lands to the State of Idaho by virtue of their reclamation, it would waive its right hereafter to deny the rights of the Canal Company, but it should be borne in mind that, even as to this, the State and the Irrigation Company were not proceeding in the manner provided by the statutes of Idaho relating to the acquisition of rights of way.

Hence, the Irrigation Company acquired a right of way only by virtue of the completion of its canals.

Neither is it shown that the irrigation company acquired a right of way over any private or entered lands except by virtue of its construction and completion of the canal. This statement applies to the desert entry and Carey Act entry of Mrs. Hammett at or near the point where the Kings Hill Syphon pipe-line connects with the Kings Hill Branch Canal, as also to the private lands north of the river, which are irrigated through this pipe-line and, under the authority of Bear Lake etc. v. Garland, *supra*, the lien would hold the same as in the case of public lands of the United States.

It is claimed that, prior to July 13, 1909, the date on which the Pipe Company began to furnish materials, the canal and works had been completed. It appears, however, by the maps in evidence that in December, 1908, the Irrigation Company filed in the office of the State Board of Land Commissioners (or the State Engineer) a map of the project show-

ing the line of the main canal, and that, at the same time, it filed a map of its distribution system, which last named map shows the several laterals for which materials were furnished by the Pipe Company.

It can hardly be contended that the completion of the main canal was a completion of the project or as in any sense a compliance on the part of the Irrigation Company with its agreement with the State.

The system was to be constructed as a whole and was essential to the reclamation of the lands which the Irrigation Company had undertaken to reclaim. We say, therefore, that the works were not completed until the irrigation system outlined in plans formulated by the Company's engineers, and which plans were accepted and approved by the State, were actually executed, and there is even now, and was at the time of the trial, an absence of proof that the project has even yet been completed in compliance with the agreement with the State. The fact, as stated in the Supplemental Trust Deed that the bonds could not be certified by the Trustee under the mortgage, except upon sworn evidence to be furnished by the officers of the company that the system was completed to an extent sufficient to furnish water to the settlers, is no evidence of its completion. It is and was at best a self-serving declaration, and there is a total absence of proof that the State Engineer or State Land Board, the only authorities qualified to pass upon the question, had approved the system as completed. If this system had, or has, been completed, there would be proof of that fact in the Record, by evidence of an official character, easy to ob-

tain. We contend, therefore, that the evidence shows that the project was in the constructive stage during the times that the material described in the lien of the Pacific Coast Pipe Company was furnished and used, and we have the testimony of Mr. Swendson, the Chief Engineer (See testimony p. 9, taken before Examiner at Boise, in cause No. 351, Pacific Coast Pipe Co. v. Kings Hill Irrigation & Power Co.) [Tr. pp. 301-306], that all these materials were ordered to be used in the construction of the system and that they were actually used in such construction and were essential to the completion of the system.

Counsel for the Trust Company, on cross-examination of Mr. W. G. Swendson, made an apparent attempt to show that the invoices of pipe furnished for the Tuano Gulch pump and pipe-line was something foreign to the main enterprise, but Mr. Swendson, on redirect examination, showed that these works were for the purpose of, and were necessary to, the irrigation of lands which had been segregated at the request of the irrigation company and which it had contracted with the State to irrigate and reclaim.

Now, as to the Kings Hill Branch: It appears by the map of the distribution system filed and approved Dec. 17-18, 1908 (see maps attached as exhibits to depositions for plaintiff in cause No. 351, transmitted to and now on file with the clerk in this cause, No. 2452), that the Kings Hill Branch was in contemplation and that it was a part of the system to be constructed pursuant to the agreement between the company and the state. The Kings Hill

